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constructed, or established after December 31, 1983, is allowable only for the portion of the capital debt that does not exceed 80 percent of the historical capital cost of the capital asset including points, financing charges, and bond premiums or discounts subject to the limitations in Section 5.010.

## **SECTION 6.000 DETERMINATION OF TOTAL PAYMENT RATE.**

Section 6.010 Total payment rate. The total payment rate is the sum of the operating payment rate and the property payment rate.

### A. Operating payment rate.

(1) The operating payment rate is the facility's total payment rate in effect on September 30, 2000, minus the property rate. It includes the efficiency incentive in effect as of September 30, 2000.

(2) Within the limits of appropriations for this purpose, the operating payment rate is increased for each rate year by the annual percentage change in the Employment Cost Index for Private Industry Workers--Total Compensation in the second quarter of the calendar year preceding the start of the rate year. For the initial rate year, the percentage change is based on the percentage change in the Employment Cost Index for Private Industry Workers--Total Compensation for the 15-month period from October 1, 2000 through December 31, 2001, as forecast by Data Resources, Inc.

(3) The operating payment rate is adjusted to reflect an occupancy rate equal to 100 percent of a facility's capacity days as of September 30, 2000.

(4) For the initial rate year, the Department will make an adjustment to the operating payment rate for a facility that submits a plan, approved by the Department, in accordance with unit (b). Operating costs will be separated into compensation-related costs and all other costs. Compensation-related costs means allowable program operating cost category employee training expenses and allowable salaries, payroll taxes, and fringe benefits for all employees except the administrator and central office staff.

(a) Facilities that have rates governed by closure agreements, receivership agreements, or interim rates are not eligible for these adjustments.

(b) The payment rate is increased by:

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TN: 00-30

Approved:

Supersedes: 00-20 (00-16/99-22/99-13/98-35/98-21/97-35/97-27/96032/96-20/95-40/  
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1) 6.6 percent of compensation-related costs, 45 percent of which must be used to increase the per-hour pay rate of all employees except administrative and central office employees by an equal dollar amount and to pay associated costs for FICA, the Medicare tax, workers' compensation premiums, and federal and state unemployment insurance provided that this portion of the compensation-related increase must be used only for wage increases implemented on or after October 1, 2000, and must not be used for wage increases implemented before that date;

2) and 2.0 percent of all other operating costs.

A facility's most recent cost report submitted for desk audit will be used to calculate the adjustment.

(c) To receive the operating payment rate adjustment, a facility must apply to the Department. The application must contain a plan by which the facility will distribute the compensation-related portion of the payment rate adjustment to employees of the nursing facility. For a facility in which the employees are represented by an exclusive bargaining representative, an agreement negotiated and agreed to by the employer and the exclusive bargaining representative constitutes the plan only if the agreement is finalized after May 16, 2000.

1) The Department will review the plan to ensure that the payment rate adjustment is used as provided in unit (b).

2) To be eligible, a facility must submit its plan for the payment rate adjustment by December 31, 2000. If a facility's plan for the payment rate adjustment is effective for its employees after October 1 of the year that the funds are available, the payment rate adjustment shall be effective the same date as its plan.

(d) The Department will determine the payment rate adjustment using the categories listed above multiplied by the rate increases in unit (b), divided by the facility's actual resident days.

#### B. Property payment rate.

(1) The property payment rate is based on the facility's modified property payment rate in effect on September 30, 2000. The modified property payment rate is the actual property payment rate exclusive of the effect of gains or losses on disposal of capital assets or adjustments for excess depreciation claims.

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(2) Effective October 1, 2000, a minimum property payment rate of \$8.13 is applied to all existing facilities. Effective October 1, 2000, facilities with modified property payment rates effective September 30, 2000 below the minimum property payment rate receive an increase equal to the difference between the minimum property payment rate and the modified property payment rate in effect on September 30, 2000. Effective October 1, 2000, facilities with modified property payment rates effective September 30, 2000 at or above the minimum property payment rate receive the modified property payment rate.

(3) Within the limits of appropriations for this purpose, effective January 1, 2002, facility property payment rates are increased annually for inflation. The increase is based on each facility's property payment rate in effect on September 30, 2000.

(4) Modified property payment rates effective September 30, 2000 are arrayed from the highest to lowest before applying the minimum property payment rate in subitem (2).

(a) For modified property payment rates at the 90<sup>th</sup> percentile or above, the annual inflation increase is zero.

(b) For modified property payment rates below the 90<sup>th</sup> percentile but at least at the 75<sup>th</sup> percentile, the annual inflation increase is one percent.

(c) For modified property payment rates below the 75<sup>th</sup> percentile, the annual inflation increase is 2 percent.

Section 6.020 Limitations to total payment rate. The total payment rate must not exceed the rate paid by private paying residents for similar services for the same period.

## **SECTION 7.000 PASS-THROUGH OF TRAINING AND HABILITATION SERVICES CHARGES.**

Charges incurred by the ICF/MR for day training and habilitation services are paid as a pass-through payment. The pass-through payment is paid separately and is not included in the computation of the total payment rate.

Approved:  
Supersedes: 00-20 (00-16/99-22/99-13/98-35/98-21/97-35/97-27/96032/96-20/95-40/  
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## **SECTION 8.000 APPEAL PROCEDURES.**

### **Section 8.010 Scope of appeals.**

A provider may appeal from a determination of a payment rate established pursuant to this Attachment if the appeal, if successful, would result in a change to the provider's payment rate. Appeals must be filed in accordance with procedures in this section.

### **Section 8.020 Filing of appeals.**

To appeal, the provider files with the Department a written notice of appeal; the appeal must be postmarked or received by the Commissioner within 60 days of the date the determination of the payment rate was mailed or personally received by a provider, whichever is earlier. The notice of appeal must specify each disputed item; the reason for the dispute; the total dollar amount in dispute for each separate disallowance, allocation, or adjustment of each cost item or part of a cost item; the computation that the provider believes is correct; the authority in statute upon which the provider relies for each disputed item; the name and address of the person or firm with whom contacts may be made regarding the appeal; and other information required by the Commissioner.

### **Section 8.030 Contested case procedures appeals review process.**

A. Effective for desk audit appeals on or after October 1, 2000, the Commissioner must review appeals and issue a written appeal determination on each appeals item within one year of the due date of the appeal. Upon mutual agreement, the Commissioner and the provider may extend the time for issuing a determination for a specified period. The Commissioner must notify the provider by first class mail of the appeal determination. The appeal determination takes effect 30 days following the date of issuance specified in the determination.

B. In reviewing the appeal, the Commissioner may request additional written or oral information from the provider. The provider has the right to present information by telephone, in writing, or in person concerning the appeal to the Commissioner prior to the issuance of the appeal determination within six months of the date the appeal was received by the Commissioner. Written requests for conferences must be submitted separately from the appeal letter. Statements made during the review process are not admissible in a contested case hearing absent an express stipulation by the parties to the contested case.

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C. For an appeal item with which the provider disagrees with the appeal determination, the provider may file with the Commissioner a written demand for a contested case hearing to determine the proper resolution of specified appeal items. The demand must be postmarked or received by the Commissioner within 30 days of the date of issuance specified in the determination. A contested case demand for an appeal item nullifies the written appeal determination issued by the Commissioner for that appeal item. The Commissioner must refer any contested case demand to the office of the Attorney General.

D. A contested case hearing must be heard by an administrative law judge. In any proceeding under this section, the appealing party must demonstrate by a preponderance of the evidence that the determination of a payment rate is incorrect.

E. Regardless of any rate appeal, the rate established must be the rate paid and must remain in effect until final resolution of the appeal or subsequent desk audit adjustment.

F. The Commissioner has discretion to issue to the provider a proposed resolution for specified appeal items upon a request from the provider filed separately from the notice of appeal. The proposed resolution is final upon written acceptance by the provider within 30 days of the date the proposed resolution was mailed to or personally received by the provider, whichever is earlier.

Section 8.040 Attorney's fees and costs.

A. For an issue appealed under Section 8.010, the prevailing party in a contested case proceeding or, if appealed, in subsequent judicial review, must be awarded reasonable attorney's fees and costs incurred in litigating the appeal, if the prevailing party shows that the position of the opposing party was not substantially justified. The procedures for awarding fees and costs set forth in state law regarding procedures for award of fees in contested cases must be followed in determining the prevailing party's fees and costs except as otherwise provided in this section. For purposes of this section, "costs" means subpoena fees and mileage, transcript costs, court reporter fees, witness fees, postage and delivery costs, photocopying and printing costs, amounts charged the Commissioner by the office of administrative hearings, and direct administrative costs of the Department; and "substantially justified" means that a position had a reasonable basis in law and fact, based on the totality of the circumstances prior to and during the contested case proceeding and subsequent review.

B. When an award is made to the Department under this section, attorney fees must be calculated at the cost to the Department. When an award is made to a provider under this section, attorney fees must be calculated at the rate charged to the provider except that attorney fees awarded must be the lesser of the attorney's normal hourly fee or \$100 per hour.

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C. In contested case proceedings involving more than one issue, the administrative law judge must determine what portion of each party's attorney fees and costs is related to the issue or issues on which it prevailed and for which it is entitled to an award. In making that determination, the administrative law judge must consider the amount of time spent on each issue, the precedential value of the issue, the complexity, of the issue, and other factors deemed appropriate by the administrative law judge.

D. When the Department prevails on an issue involving more than one provider, the administrative law judge must allocate the total amount of any award for attorney fees and costs among the providers. In determining the allocation, the administrative law judge must consider each provider's monetary interest in the issue and other factors deemed appropriate by the administrative law judge.

E. Attorney fees and costs awarded to the Department for proceedings under this section must not be reported or treated as allowable costs on the provider's income and expense report.

F. Fees and costs awarded to a provider for proceedings under this section must be reimbursed to them within 120 days of the final decision on the award of attorney fees and costs.

G. If the provider fails to pay the awarded attorney fees and costs within 120 days of the final decision on the award of attorney fees and costs, the Department may collect the amount due through any method available to it for the collection of medical assistance overpayments to providers. Interest charges must be assessed on balances outstanding after 120 days of the final decision on the award of attorney fees and costs. The annual interest rate charged must be the rate charged by the Commissioner of revenue for late payment of taxes that is in effect on the 121st day after the final decision on the award of attorney fees and costs.

H. Amounts collected by the Commissioner pursuant to this section must be deemed to be recoveries.

#### Section 8.050 Legal and related expenses.

Legal and related expenses for unresolved challenges to decisions by governmental agencies must be separately identified and explained on the provider's income and expense report for each year in which the expenses are incurred. When the challenge is resolved in favor of the governmental agency, the provider must notify the Department of the extent to which its challenge was unsuccessful on the income and expense report filed for the reporting year in which the challenge was resolved. In addition, the provider must inform the Department of the

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years in which it claimed legal and related expenses and the amount of the expenses claimed in each year relating to the unsuccessful challenge. The Department must reduce the provider's medical assistance rate in the subsequent rate year by the total amount claimed by the provider for legal and related expenses incurred in an unsuccessful challenge to a decision by a governmental agency.

## **SECTION 9.000 RECEIVERSHIP.**

**Section 9.010 Receivership agreement.** A majority of controlling individuals of a residential program may at any time ask the Department to assume operation of the residential program through appointment of a receiver. On receiving the request, the Department may enter into an agreement with a majority of controlling individuals and become the receiver and operate the program under conditions acceptable to both the Department and the majority of controlling individuals. The agreement will specify the terms and conditions of the receivership and preserve the rights of the persons being served by the program. A receivership set up under this section terminates at the time specified by the parties to the agreement.

**Section 9.020 Management agreement.** When the Department agrees to become the receiver of a program, the Department may enter into a management agreement with another entity or group to act as the managing agent during the receivership period. The managing agent will be responsible for the day-to-day operations of the residential program subject at all times to the review and approval of the Department. A reasonable fee may be paid to the managing agent for the performance of these services.

**Section 9.030 Rate adjustment.** The sections on rate recommendations and adjustments to the rate found in Section 10.000 also apply to voluntary receiverships.

**Section 9.040 Controlling individuals; restrictions on licensure.** No controlling individual of a residential program placed into receivership under Section 9.000 must apply for or receive a license to operate a program for five years from the commencement of the receivership period. Section 9.000 does not apply to programs that are owned or operated by controlling individuals, that were in existence prior to the date of the receivership agreement, and that have not been placed into receivership.

**Section 9.050 Liability.** The controlling individuals of a residential program placed into receivership remain liable for any claims made against the residential program that arose from incidents or events that occurred prior to the commencement of the receivership period. Neither the Department nor the managing agent of the Department assumes this liability.

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Approved:

Supersedes: 00-20 (00-16/99-22/99-13/98-35/98-21/97-35/97-27/96032/96-20/95-40/  
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Section 9.060 Liability for financial obligations. Neither the Department nor the managing agent will be liable for payment of any financial obligations of the residential program or of its controlling individuals incurred prior to the commencement of the receivership period unless such liability is expressly assumed in the receivership agreement. Those financial obligations remain the liability of the residential program and its controlling individuals. Financial obligations of the residential program incurred after the commencement of the receivership period are the responsibility of the Department or the managing agent to the extent such obligations are expressly assumed by each in the receivership or management agreements. The controlling individuals of the residential program remain liable for any financial obligations incurred after the commencement of the receivership period to the extent these obligations are not reimburse in the rate paid to the residential program and are reasonable and necessary to the operation of the residential program. These financial obligations, or any other financial obligations incurred by the residential program prior to the commencement of the receivership period that are necessary to the continued operation of the residential program, may be deducted from any rental payments owed to the controlling receivership agreement.

Section 9.070 Physical plant of the residential program. Occupation of the physical plant after commencement of the receivership period will be controlled by items A and B.

A. If the physical plant of a residential program placed in receivership is owned by a controlling individual or related party, the physical plant may be used by the Department or the managing agent for purposes of the receivership as long as the receivership period continues. A fair monthly rental will be paid by the Department or the managing agent to the owner of the physical plant. This fair monthly rental will be determined by considering all relevant factors necessary to meet required arms-length obligations of controlling individuals. This rental will not include any allowance for profit or be based on any formula that includes an allowance for profit.

B. If the owner of the physical plant is not a related party, the controlling individual shall continue as the lessee of the property. However, during the receivership period, rental payments shall be made to the owner of the physical plant by the Department or the managing agent on behalf of the controlling individual. Neither the Department nor the managing agent assumes the obligations of the lease unless expressly stated in the agreement. Should the lease expire during the receivership, the Department or the managing agent may negotiate a new lease for the term of the receivership period.

Section 9.080 Receivership costs. The Department may use the accounts and funds that would have been available for the room and board, services, and program costs of persons in the residential program for costs, cash flow, and accounting purposes related to the receivership.



TN: 00-30

Approved:

Supersedes: 00-20 (00-16/99-22/99-13/98-35/98-21/97-35/97-27/96032/96-20/95-40/  
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## **SECTION 10.000 INVOLUNTARY RECEIVERSHIP.**

**Section 10.010 Application.** In addition to any other remedy provided by law, the Department may petition the district court in the county where the program is located for an order directing the controlling individuals of the program to show cause why the Department should not be appointed receiver to operate the program. The petition must contain proof by affidavit: (1) that the Department has either begun license suspension or revocation proceedings, suspended or revoked a license, or has decided to deny an application for licensure of the program; or (2) it appears to the Department that the health, safety, or rights of the residents may be in jeopardy because of the manner in which the program may close, the program's financial condition, or violations committed by the program of federal or state laws or rules. If the license holder, applicant, or controlling individual operates more than one program, the Department's petition will specify and be limited to the residential program for which it seeks receivership. The affidavit submitted must set forth alternatives to receivership that have been considered, including rate adjustments. The order to show cause is returnable not less than five days after service is completed and must provide for personal service of a copy to the program administrator and to the persons designated as agents by the controlling individuals to accept service on their behalf.

**Section 10.020 Appointment of receiver.** If the court finds that involuntary receivership is necessary as a means of protecting the health, safety, or rights of persons being served by the program, the court will appoint the Department as receiver to operate the program. The Department may contract with another entity or group to act as the managing agent during the receivership period. The managing agent will be responsible for the day-to-day operations of the program subject at all times to the review and approval of the Department.

**Section 10.030 Powers and duties of the receiver.** Within 36 months after the receivership order, the receiver will provide for the orderly transfer of the persons served by the program to other residential programs or make other provisions to protect their health, safety, and rights. The receiver or managing agent will correct or eliminate deficiencies in the program that the Department determines endanger the health, safety, or welfare of the persons being served by the residential program unless the correction or elimination of deficiencies involves major alteration in the structure of the physical plant. If the correction or elimination of the deficiencies requires major alterations in the structure of the physical plant, the receiver will take actions designed to result in the immediate transfer of persons served by the program. During the period of the receivership, the receiver and the managing agent will operate the program in a manner designed to preserve the health, safety, rights, adequate care, and supervision of the persons served by the program. The receiver or the managing agent may make contracts and incur lawful expenses. The receiver or the managing agent shall collect incoming payments from all sources and apply them to the cost incurred in the performance of

STATE: MINNESOTA  
Effective: October 1, 2000  
TN: 00-30

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Approved:  
Supersedes: 00-20 (00-16/99-22/99-13/98-35/98-21/97-35/97-27/96032/96-20/95-40/  
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the functions of the receivership. No security interest in any real or personal property comprising the residential program or contained within it, or in any fixture of the physical plant, shall be impaired or diminished in priority by the receiver or the managing agent.

Section 10.040 **Liability and liability for financial obligations.** These are the same as those for voluntary receivership that are found in Section 9.000.

Section 10.050 **Physical plant of the residential program.** Occupation of the physical plant is governed by the following:

A. The physical plant owned by a controlling individual of the residential program or related party must be made available for the use of the program throughout the receivership period. The court will determine a fair monthly rental for the plant, taking into account all relevant factors necessary to meet required arms-length obligations of controlling individuals. The rental fee must be paid by the receiver to the appropriate controlling individuals or related parties for each month that the receivership remains in effect. No payment made to a controlling individual or related party by the receiver or the managing agent or any state agency during a period of the receivership shall include any allowance for profit or be based on any formula that includes an allowance for profit.

B. If the owner of the physical plant of a program is not a related party, the court will order the controlling individual to continue as the lessee of the property during the receivership period. Rental payments during the receivership period shall be made to the owner of the physical plant by the Department or the managing agent on behalf of the controlling individual.

Section 10.060 **Fee.** A receiver or the managing agent is entitled to a reasonable fee as determined by the court.

Section 10.070 **Termination.** An involuntary receivership terminates 36 months after the date on which it was ordered or at any other time designated by the court or when any of the following occurs:

A. The Department determines that the program's license application should be granted or should not be suspended or revoked.

B. A new license is granted to the program.

C. The Department determines that all persons residing in the program have been provided with alternative residential programs.

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Approved:

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D. The residential program closes.

Section 10.080 Emergency procedure. If it appears from the petition filed or from the affidavit filed with the petition or from testimony of witnesses under oath, that there is probable cause to believe that an emergency exists in a program, the court must issue a temporary order for appointment of a receiver within five days after receipt of the petition. Notice of the petition must be served on the residential program administrator and on the persons designated as agents by the controlling individuals to accept service on their behalf. A hearing on the petition must be held within five days after notice is served unless the administrator or designated agent consents to a later date. After the hearing, the court may continue, modify, or terminate the temporary order.

Section 10.090 Rate recommendation. The Department may review rates of a program participating in the Medical Assistance Program that is in receivership and that has needs or deficiencies documented by the Department of Health or the Department of Human Services. If the Department determines that a review of the rate established is needed, the Department will:

A. Review the order or determination that cites the deficiencies or needs.

B. Determine the need for additional staff, additional annual hours by type of employee, and additional consultants, services, supplies, equipment, repairs, or capital assets necessary to satisfy the needs or deficiencies.

Section 10.100 Adjustment to the rate. Upon review of rates the Department may adjust the program's payment rate. The Department will review the circumstances, together with the residential program income and expense report, to determine whether or not the deficiencies or needs can be corrected or met by reallocation residential program staff, costs, revenues, or other resources including any investments, efficiency incentives, or allowances. If the Department determines that any deficiency cannot be corrected or the need cannot be met with the payment rate currently being paid, the Department must determine the payment rate adjustment by dividing the additional annual costs established during the Department's review by the residential program's actual resident days from the most recent desk-audited income and expense report or the estimated resident days in the projected receivership period. Upon the subsequent sale or transfer of the program, the Department may recover amounts that were paid as payment rate adjustments under this section. The buyer or transferee shall repay this amount to the Department within 60 days after the Department notifies the buyer or transferee of the obligation to repay.

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Effective: October 1, 2000  
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Approved:

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Section 10.110 Receivership costs. The Department may use the accounts and funds that would have been available for the room and board, services, and program costs of persons in the residential program for costs, cash flow, and accounting purposes related to the receivership.

### **SECTION 11.000 SPECIAL SITUATIONS.**

Section 11.010 Closure. In order to facilitate an orderly transition of residents from community ICFs/MR to services provided under the home and community-based services waiver programs, upon closure of a facility, the facility's contract is amended.

Section 11.020 Variable rate adjustments. The following items apply for the payment rate adjustment.

A. A resident's county of financial responsibility requests a variable rate adjustment. The Department grants variable rate adjustments.

(1) If granted, the adjustment requested due to a change in a resident's needs is \$50.00 per day.

(2) If granted, the adjustment requested due to the need to purchase equipment is the daily cost calculated by dividing the total cost of the equipment by the days in the month.

(3) If granted, the adjustment requested due to a resident's need for crisis intervention services is the daily cost of crisis placement.

B. Variable rate adjustments may be granted for up to one year. The need to continue a variable rate adjustment must be reviewed at the end of the anticipated duration of need but at least annually.

C. To continue a variable rate adjustment, a new request must be submitted to the Department by the end date.

D. When a variable rate is reported by facilities, monthly bed use data must be used to track the amount and time span of the rate adjustment. The total payments made to facilities may be adjusted based on concurrent changes in the needs of residents that are covered by a variable rate adjustment.

F. Any adjustment for multiple resident changes must not result in a decrease to the facility base rate.

Section 11.030 Temporary adjustments to address occupancy and access.

A. A host county may request a temporary adjustment if a facility is operating at less than 100 percent occupancy on September 30, 2000, or if a resident is discharged from a facility. Temporary adjustments may be granted by the Department for up to 90 days when a vacancy occurs.

B. The temporary rate adjustment is equal to the loss of revenue experienced due to the vacancy. The adjustment will not be used to pay for hospital or therapeutic leave days beyond the maximums allowed.

C. If the host county and the facility determine the need to retain the bed capacity for more than 90 days, the host county may request an extension of a temporary rate adjustment for a designated time period from the statewide advisory committee. The statewide advisory committee determines whether to recommend that the Department grant the extension.

Section 11.040 Other payment rate adjustments. Facilities may apply for rate adjustments for capital improvements, conversion of beds from Class A to Class B, downsizing, and relocations. The statewide advisory committee determines whether to recommend that the Department grant the rate adjustments.

Section 11.050 Relocation.

A. For the initial rate year, property rates for facilities relocated after December 31, 1997, and up to and including October 1, 2000, have the full annual costs of relocation included in the initial rate year property rate. The property rate for the relocated facility is subject to the costs that were allowable in the State plan in effect on September 30, 2000 (pages 130-237 + Supplement 1) and the investment per bed limitation for newly constructed or newly established class B facilities.

B. As of January 1, 2002, property rates for facilities relocated after October 1, 2000 may be adjusted.

(1) Relocated facilities are subject to the investment per bed limit for newly constructed or newly established class B facilities. The limits are adjusted on January 1 of each year by the percentage increase in the construction index published by the Bureau of Economic Analysis of the United States Department of Commerce in the Survey of Current